NO. 22501 ✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLAUDE FRANKLIN MOORE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant United States Attorney
Chief, Criminal Division,
THEODORE E. ORLISS,
Assistant United States Attorney

1200 United States Court House
312 North Spring Street
Los Angeles, California

Attorneys for Appellee,
United States of America.

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Attorneys for Appellee,
United States of America.

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I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

Appellant, Claude Franklin Moore, was charged in a single-count indictment with violation of Section 2312 of Title 18, United States Code (Interstate Transportation of Stolen Motor Vehicle).

Appellant was found guilty on July 18, 1966, after a court trial before the Honorable Roger D. Foley, in the United States District Court for the Southern District of California, Central Division.

The Court below sentenced appellant on July 25, 1966, pursuant to the Federal Youth Corrections Act, Section 5010(c) of Title 18, United States Code.

Appellant, in Forma Pauperis, appeals from his conviction and sentence.

The District Court had jurisdiction of the case under Section 3231 of Title 18, United States Code.

This Court has jurisdiction under Section 1291 and 1294 of Title 28, United States Code.

II

STATEMENT OF FACTS

At approximately 4:30 P. M. on Friday, June 10, 1966, appellant was arrested in Redondo Beach, California by Alan Duwayne Woods, a patrolman for the City of Redondo Beach (Tr. 34, 35 and 43).[1] Patrolman Woods testified he arrested the appellant in accordance with a warrant, which charged appellant with a 1962 burglary.

At the time of arrest defendant was seated in a white 1961 Chevrolet convertible (Tr. 35). Officer Woods informed appellant of his rights and asked to see a copy of the registration slip which the appellant could not produce (Tr. 38).

When the vehicle identification number was checked it was found that the car was registered in the name of a Mr. Charles A. Cusimano, a used car dealer in New Orleans, Louisiana. Mr. Cusimano testified that on either May 28 or 29 he discovered that the white 1961 Chevrolet was missing from his used car lot (Tr.

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[1] "Tr." refers to Reporter's Transcript of Proceedings.

5 and 6). He further stated that the vehicle had no current license or registration and that he had given no one permission to use it (Tr. 5 and 6).

Appellant was taken by Officer Woods and another officer to the Redondo Beach Police Station where he arrived about 6:00 p.m. (Tr. 43) and was booked at 6:16 p.m. (Tr. 34).

On June 13, 1966 at approximately 10:00 a.m., Russell Pelz, a police officer for the city of Redondo Beach, met with the appellant at appellant's request (Tr. 48). After being advised of his constitutional rights (Tr. 25), appellant stated that on or about May 25, 1966, while in Alabama, he requested a friend to go out and get him a car. This friend, whom appellant would not name, returned later that day with a 1961 white Chevrolet convertible which had no license plates. Appellant removed the license plates from a 1953 Plymouth that he had been using and put them on the 1961 Chevrolet. He then disposed of the 1953 Plymouth by dumping it into the water at the west end of the 9th Street Bridge in Mobile, Alabama. He further stated to Officer Pelz that he drove the 1961 Chevrolet to California (Tr. 26 and 27).

Officer Pelz also testified that appellant offered to admit to the burglary if he could be guaranteed less than five years in a California prison. Officer Pelz refused this offer stating that he did not want appellant to admit to anything not done and would make no promises to him (Tr. 28 and 33).

Officer Pelz called the local Federal Bureau of Investigation office (Tr. 32).

Special Agents Barry and McGuire arrived at the Redondo Beach Police Station at approximately 4:00 p.m. to interrogate appellant concerning the car (Tr. 13, 14, 15 and 16). At this time the car had not been verified as stolen (Tr. 73).

Agent Barry advised appellant of his constitutional rights and after appellant indicated that he fully understood these rights he began his questioning (Tr. 10, 11 and 19). Agent Barry testified that he and McGuire interrogated appellant for about 30 or 40 minutes (Tr. 14) and that Officer Pelz was not present before or during the interview (Tr. 15 and 16).

Agents Barry and McGuire obtained a signed statement from appellant which contained substantially the same fact content as the statements made to Officer Pelz concerning the obtaining and use of the vehicle. Appellant also indicated to Agent Barry that his past experience with his friend who brought him the car, led him to believe that the car was stolen and that he realized, if the car were stolen, he had violated federal law by transporting a stolen car across state lines to California (Tr. 21, 22 and 71). The appellant also told Agent Barry that he drove to California from Mobile, Alabama through Illinois, Indiana, Iowa, Nebraska, Colorado, Utah, Wyoming, and Nevada using the on and off switch as he had no keys to the car (Tr. 71 and 72).

Agent Barry testified that he made no promises and that he told appellant that he had no knowledge of any prosecutions pending in the state of Louisiana (Tr. 15 and 75).

On June 14, 1966 appellant was brought before the United

States Commissioner on the federal charge. The 1962 burglary charge was dropped as indicated on the booking sheet (defendant's Exhibit A (Tr. 33)). There was some disagreement over who signed the booking sheet. Officer Pelz indicated another officer had done so (Tr. 69) and appellant claimed it was Officer Pelz (Tr. 76 and 77).

Appellant testified that he was arrested at about 4:30 p.m. and arrived at the police station at about 6:00 p.m. where he was interrogated briefly by a desk sergeant concerning the 1962 burglary (Tr. 43 and 44).

Appellant further testified that he requested a phone call on the way to, and when he arrived at, the station (Tr. 51) but was not allowed to make one until 2:00 a.m. At this time, according to his testimony, he placed a call to an agent for a Louisiana bonding company which had him on a bail bond, but was unable to complete the call as the agent was not in his office (Tr. 47). He was told he could complete the call later. At 4:00 a.m. the next morning when he requested permission to place the call he was told by an officer that the call would not be necessary as a hold had been placed upon him for bail jumping by the State of Louisiana (Tr. 47). Appellant further stated that the officer told him that the state of Louisiana would take appellant back if he were not prosecuted on the burglary charge (Tr. 47 and 48) and that he later learned there was no such hold (Tr. 50).

As to the interrogation by Officer Pelz, appellant testified that he was not fully advised of his constitutional rights. He

claimed that Officer Pelz offered him an opportunity to place a phone call, but did not advise him of his right to an attorney (Tr. 6).

Appellant further stated that he offered to confess to the burglary if Officer Pelz could guarantee him that he would not have to return to Louisiana but Officer Pelz said he could not do this (Tr. 48). However, appellant claimed that Officer Pelz told him that he would be tried in California if the car proved to be stolen and that he promised to cancel the burglary charge or would be dismissed if appellant gave a statement concerning the car (Tr. 48, 49, 58 and 59).

Appellant also testified that just prior to his interrogation by Special Agents Barry and McGuire, Officer Pelz stated to him that he still did not know whether the car was stolen. He allegedly advised appellant to give the Federal Bureau of Investigation a statement and that if the car had been stolen, the hold on the burglary charge would be dismissed (Tr. 50).

Appellant testified that since a Redondo Beach Police Officer had informed him that there was a hold placed on him for bail jumping in Louisiana, he thought there was an immediate prospect of his being returned to Louisiana. To delay his return, he gave statements about the car to Officer Pelz and Agent Barry but he later learned there was no such hold (Tr. 50 and 78).

On rebuttal Officer Pelz denied that he had promised to dismiss the burglary charge if a statement was given by appellant to the Federal Bureau of Investigation or that he told appellant

that since the burglary warrant was old there would probably be no prosecution on it (Tr. 65 and 66). Agent Barry also indicated that no promises had been made (Tr. 72) although appellant expressed concern about pending prosecution in Louisiana and California. Agent Barry stated that he had no knowledge of any other possible prosecutions (Tr. 75).

Appellant moved to strike the testimony of the Redondo Beach Police officers and Agent Barry concerning statements given by him (Tr. 79 and 85) on the grounds that he was under duress at the time. The trial court denied the motion and found that appellant was accorded all of his constitutional rights by the Redondo Beach Police and the federal agent (Barry) before making his inculpatory statements (Tr. 88).

The court below found no evidence of a "police-dominated atmosphere" that would cause a psychological disadvantage to appellant, and further found that all of the safeguards required by Miranda v. Arizona, 384 U.S. 436 (1966) were followed (Tr. 88).

The trial court also held that, even without the inculpatory statements, appellant was found in possession of a stolen vehicle and that possession was unexplained which raised the following inferences: (1) that appellant transported the motor vehicle in interstate commerce and (2) that he knew it to be a stolen vehicle (Tr. 88).

Thereupon, the trial court adjudged appellant guilty as charged (Tr. 89).

III

ARGUMENT

A. APPELLANT'S STATEMENTS TO POLICE OFFICER PELZ AND FEDERAL AGENT BARRY WERE PROPERLY ADMITTED AS THEY WERE MADE AFTER APPELLANT RECEIVED ADEQUATE MIRANDA WARNINGS AND AFTER HE KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHTS.

At the close of the trial appellant moved that the statements made to the police officers and an agent of the Federal Bureau of Investigation be stricken from the record. This motion was made on the grounds that appellant had given these statements under the duress of a "police dominated atmosphere" and because of this pressure the statements were not voluntary (Tr. 84, 85 and 86).

The Court found, upon examining the testimony of the officers, as well as the appellant, that the appellant had been accorded all his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966) and that there was no "police-dominated atmosphere" which would have pressured appellant into his statements (Tr. 88).

It is urged by the Government that the only argument which may be made on appeal concerning the appellant's admissions would derive from the motion to suppress the statements on the grounds of duress (Tr. 84-86). The record reveals that for each of the other asserted grounds appellant failed to exercise the

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remedies available to him at trial. Unless good cause for such failure can be shown it is settled that "failure to make objection to evidence either before or at trial precludes consideration of objections thereto on appeal. . . ." Bouchard v. United States, 344 F. 2d 872, 875 (9th Cir. 1965) cited in Toland v. United States, 365 F. 2d 304, 306 (9th Cir. 1966).

The Court in the Toland case, supra, at 306 note 1, gives an example of what might constitute good cause. The Court points out that where a right has not yet been recognized by the appellate courts such failure may not preclude an appeal on the basis of the violation of that right, citing the Court's discussion of the Westover case in Miranda v. Arizona, 384 U. S. 436, Footnote 69 (1966).

If appellant argues that his motion to strike at the end of the trial was a general one and not intended to be limited to the grounds of duress then the trial Court's ruling precludes further argument on appeal. If the objection is specific, as it appears to be, appellant is limited to the grounds specified. This is pointed out in United States v. Indiviglio, 352 F. 2d 276, 279 (2nd Cir. 1965):

> "Wigmore says 'the cardinal principle (no sooner repeated by Courts than ignored by counsel) is that a general objection, if overruled, cannot avail the objector on appeal,' and 'a specific objection overruled will be effective to the extent of the grounds specified, and no further.' "

In On Lee v. United States, 343 U. S. 747 (1951), the Court said that the orthodox rule of evidence requiring specification of the objection, "is buttressed by the uniform policy requiring constitutional questions to be raised at the earliest possible stage in the litigation." On Lee v. United States, supra at 750 n. 3.

It is further clear that this was not "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure, United States v. Armetta, 378 F. 2d 658 (2nd Cir. 1967).

In the Armetta case the defense counsel raised an objection as to the sufficiency of the warnings given to the defendant. The trial judge allowed the witness to testify subject to a motion to strike if the Special Agent had not in fact given proper warnings. There was no further motion made. The Court held that because of the evident familiarity of defense counsel with the Miranda decision and the familiarity of those lawyers involved in the criminal courts, this could not be a case of excusable neglect or one falling within the provisions of the "plain error" rule. Armetta, supra, at 661.

In the case at hand the appellant objected to the admission of statements made by Special Agent Barry on the grounds that no foundation had been laid (Tr. 10). This objection was sustained and further testimony was elicited concerning the warnings (Tr. 11). At this point appellant again interjected the same objection and voir dired Agent Barry. After the voir dire (Tr. 12-18) and further testimony by Agent Barry concerning the warnings (Tr. 18 and 19) appellant failed to renew his objections, apparently

satisfied that proper warnings and waivers had been given. Because of this failure to renew his objection the statements made to Agent Barry were properly allowed into evidence.

As to Officer Pelz's testimony the appellant requested to voir dire Officer Pelz before allowing Barry to testify as to the statements (Tr. 19). The Court informed appellant that if he felt at the time of the examined Officer Pelz that there might be grounds for exclusion of the statements by Pelz and Barry then he could make a motion at that time (Tr. 19). There was never any such objection to the fact that Officer Pelz had not properly given the Miranda warnings or obtained a knowing and intelligent waiver from appellant. There is likewise no indication of any objection to any warnings given by or waivers given to any other officer.

It is urged by the Government that appellant's arguments concerning the failure to properly give the Miranda warnings or to demonstrate a knowing and intelligent waiver are not properly raised on appeal and should not be considered by this Court.

But even assuming that appellant has properly laid a foundation for raising these arguments they have no basis in substance. Each rests on an evaluation of the evidence contrary to the findings of the trial judge.

1. THE WARNINGS GIVEN BY THE REDONDO BEACH POLICE AND THE FEDERAL BUREAU OF INVESTIGATION OF THE APPELLANT'S CONSTITUTIONAL RIGHTS WERE FULLY AND EFFECTIVELY STATED.

The Government did not introduce any statements made to the arresting Officer Woods (Tr. 34-36). The conversation between Woods and appellant was brought out by appellant upon cross-examination (Tr. 36-41). The only related point, defendant's inability to produce a registration slip for the car, had no bearing on his arrest which was on a felony warrant (Tr. 39).

Again, defendant, and not the Government, in defendant's case-in-chief, offered the only evidence about an interrogation by the desk sergeant, which was solely related to the burglary charge, and held immaterial and irrelevant by the trial Court (Tr. 44-45).

The warnings given by Officer Pelz are reflected by his testimony (Tr. 25):

> "I advised the defendant that he had the right to remain silent, that anything that defendant said could be used against him in court proceedings that were to follow, also that he was entitled to have an attorney of his own choice and in the event he was unable to afford an attorney that the court would appoint the public defender, the public defender was available to him.

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[illegible]

> "Q. (By Counsel for the Government): And did you indicate when he was entitled to have an attorney at what point?
>
> "A. I told him he could have it any time he wanted one, at any time he wanted to call one."

Appellant's version of the warnings is in disagreement with the above (Tr. 46).

> "Q. (By Counsel for appellant): Ok. Now, at that particular time did he advise you of your rights, or do you remember?
>
> "A. He advised me of my right to stay silent, that anything I said could be used against me.
>
> "Q. Did he advise you of your right to have an attorney before you made any statements to him?
>
> "A. He didn't. He asked me if I wanted to make a phone call, and that was the extent of it."

It clearly appears that the warnings given by Officer Pelz met the requirements set out in Miranda v. Arizona, supra. The Miranda decision demands that:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to presence of an attorney, either retained or appointed." Miranda, supra, at 444.

It is also clear that the warnings given by Agent Barry

were complete (Tr. 10, 11, 18 and 19). Here appellant was told, in substance, of his right to remain silent (Tr. 10 and 18), that any statement that he might give could be used against him in Court (Tr. 19), that he had a right to an attorney (Tr. 10, 11 and 19), and that if he could not afford an attorney one would be appointed for him (Tr. 10). A review of this testimony indicates that all the safeguards had been met by Agent Barry using the Federal Bureau of Investigation warning procedure approved in Miranda, supra, at 483-484.

"Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties." Coyote v. United States, 380 F. 2d 305 (10th Cir. 1967). What Miranda does require is meaningful advice to the unlettered and unlearned in language which can be comprehended and on which he can knowingly act. Coyote, supra, at page 308. The Coyote court accordingly held that warning to the effect that the defendant ". . . can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke" was sufficient under Miranda.

In Keegan v. United States, 385 F. 2d 260 (9th Cir. 1967), this Court held the following warning to be an effective equivalent.

> "You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a court of law. If you don't have funds to pay for an attorney, we will appoint one." Keegan, supra, at 262, 264.

Appellant also argues that appellant should have been warned that in addition to remaining silent and not answering any questions, that "if he does answer any questions he may terminate the interrogation at any time he wishes and may request an attorney even though he has responded to some questions" citing Miranda, supra, at 473 and 474.

A careful reading of Miranda discloses that this is not one of the warnings which must be given but is merely a right of the person under interrogation which must be honored at anytime he chooses to exercise it. Miranda, supra, at 444 and 479.

Therefore it appears that appellant's only argument as to Officer Pelz's warning is based on a conflict in testimony between Pelz and the appellant. This then became a question of fact for the trial judge to resolve and goes to the credibility of the witnesses. As to the sufficiency of the warnings given by Pelz and Barry a reading of these warnings clearly indicates that they fully afforded the appellant with the necessary safeguards to thoroughly protect his privilege against self-incrimination.

2. THE WAIVER BY APPELLANT OF HIS CONSTITUTIONAL RIGHTS WAS NOT INDUCED BY INCOMMUNICADO INCARCERATION PRIOR TO INTERROGATION, OR TRICKERY, OR BY ANY PROMISES OF DISMISSAL OF CHARGES.

The appellant claims that he was held without the benefit of a telephone call, that he was pressured with the threat of a hold and that promises were made to him in order to obtain statements from him, and because of the above, he was subjected to a "police-dominated atmosphere" which prevented him from giving a voluntary waiver of his rights as provided for in Miranda, supra.

The trial court in evaluating this claim found no evidence of any such "police-dominated atmosphere" which would prevent the appellant from voluntarily waiving his rights (Tr. 88). In so ruling the trial Court made an evaluation of the evidence presented and an evaluation of the credibility of each witness and unless this Court finds no basis for such a decision viewing the evidence in the light most favorable to the Government, the judgment of the trial Court should stand. Fraker v. United States, 294 F.2d 859, 861 (9th Cir. 1961).

The burden of showing that the statements made were involuntary is on the appellant and in absence of evidence other than the appellant's testimony, there is no grounds for error alleged or proved in this case. In Redmon v. United States, 355 F.2d 407 (9th Cir. 1966) appellant claimed that statements made

to police were induced by promises and the Court stated:

> "The burden is upon appellant to show error. This he has failed to do. Appellant testified in his own behalf but offered not a scintilla of evidence that the statements made by him at the police station were involuntary, coerced, or induced in any manner. We find elsewhere in the record nothing to substantiate appellant's contention unless we indulge in surmise, conjecture, and unwarranted assumptions." Redmon, supra, at 412 and 413.

Here the only other evidence to substantiate appellant's claims of involuntariness was the booking sheet which only indicated that the prior burglary had been dropped. The denials of any promises by both Pelz and Barry (Tr. 33, 15, 75, 65 and 66) substantially diminish any value the booking sheet evidence may have had to the defense. As this Court is well aware law enforcement authorities often dismiss charges in favor of prosecution by other authorities on different charges to avoid senseless expenditure of time and money.

3. THE CONFESSION OBTAINED BY THE FEDERAL BUREAU OF INVESTIGATION WAS ADMISSIBLE EVEN THOUGH OBTAINED FOLLOWING INTERROGATION BY LOCAL POLICE.

Appellant seems to believe that this case is on "all fours" with the case of Westover v. United States, 384 U.S. 436 (1966), a companion case to Miranda v. Arizona. But the two cases are clearly not related. Westover was arrested by local police on a burglary charge and questioned the entire morning by local police, without benefit of any warnings. At noon the Federal Bureau of Investigation took over the interrogation and after another two to two and one-half hours a confession was obtained. There was also no indication of any waiver by Westover to the Federal Bureau of Investigation warnings, Westover, supra, at 496. The Court found that:

> "Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed." Westover, supra, at 496.

In the present case there is no indication that there was the type of intensive run-on interrogation found in Westover. The Barry interrogation was removed in time from the initial interrogation by Pelz and there is no indication that it even was in the same

room. Here also full warnings were given by local police (Tr. 25) and warnings and a waiver were given and obtained by Agent Barry. Clearly the appellant understood that the two interrogations were not the same and the harm which Westover was designed to protect against was not present in the existing case.

4. THE APPELLANT KNOWINGLY AND INTELLIGENTLY WAIVED HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

The Miranda decision does not set out a single test of what constitutes a waiver but rather leaves it to each Court to decide on an ad hoc basis if the waiver was sufficient.

> " 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.' " Miranda, supra, at 476, citing Carnley v. Cochran, 369 U.S. 506, 516 (1962).

In the present case clearly the indication to Agent Barry, by appellant, that he understood the warnings fully and was willing to discuss the vehicle was sufficient (Tr. 11). Officer Woods informed the appellant of his rights upon arrest (Tr. 38). The appellant then had the entire weekend to think over what Woods had told him. On Monday he voluntarily asked to see Officer Pelz

(Tr. 48) and at this time he again was informed of his rights (Tr. 25) and then at this time voluntarily chose to give his statement.

This situation is far from the dangerous situation in which warnings are haphazardly given and a statement is immediately taken. Here the appellant had the opportunity to understand the situation he was in and to ponder his rights. The above facts establish a knowing and willing waiver by the appellant in a more convincing manner than could be established by any verbalized waiver.

B. THE INDEPENDENT EVIDENCE IS SUFFICIENT TO SUSTAIN THE CONVICTION.

The facts of this case clearly points out that even without the admissions by appellant there was sufficient evidence to sustain a conviction. The possession of the vehicle and the testimony of Mr. Cusimano, who was found because of the vehicle identification number and not because of any admissions by appellant, was sufficient to produce a conviction. But the Government feels that it must point out that the case of Lynumn v. Illinois, 272 U.S. 528 (1963) requires reversal, regardless of the other evidence, if the admissions were improperly allowed into evidence.

C. THE CLAIM OF IMPROPER SENTENCE IS FRIVOLOUS.

The decision whether to sentence defendant under Title 18, United States Code, Section 2312, or under the Federal Youth Corrections Act, Title 18, United States Code, Section 5010(b), is within the trial Court's discretion, Standley v. United States, 318 F. 2d 700 (9th Cir. 1963).

IV

CONCLUSION

The Government submits that because of the procedural failure of appellant to properly raise his arguments and also because of the substantive weaknesses of those arguments the judgment below should be sustained.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

THEODORE E. ORLISS,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Theodore E. Orliss

THEODORE E. ORLISS